

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:AOK:OKL:TL-N-3566-00

CGMcLoughlin

date: SEP 07 2000

to: Chief, Examination Division, Arkansas-Oklahoma District
Attn: [REDACTED]

from: District Counsel, Arkansas-Oklahoma District, Oklahoma City

subject: Request for Advisory Opinion

Taxpayer: [REDACTED]

Taxable year: [REDACTED]

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

DISCUSSION

We are following up on our July 24, 2000, memorandum relating to the validity of a consent to extend the statute of limitations for the taxpayer's [REDACTED] taxable year. As you are aware, we submitted a copy of the memorandum to the National Office for review pursuant to CCDM (35)3(19)4(4). Based on that review, we emphasize that, given the current factual development, this is not a case we would pursue in litigation.

The currently available factual record does not reflect sufficient evidence of [REDACTED]'s authority to bind [REDACTED] after the [REDACTED] sale to an unrelated third-party. Given the fact that the return will be no changed, we do not suggest any further factual development be pursued on the issue. In the future, we recommend that the government obtain sufficient evidence in writing, such as a letter from the taxpayer reflecting another corporation's authority to act on the taxpayer's behalf, before accepting a similar consent. Please contact Glenn McLoughlin at (405) 297-4803 if you have any questions. We are closing our file.

/s/ MICHAEL J. O'BRIEN

MICHAEL J. O'BRIEN
District Counsel

Office of Chief Counsel
Internal Revenue Service

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date: JUL 24 2000

to: Chief, Examination Division, Arkansas-Oklahoma District
Attn: [REDACTED]

from: District Counsel, Arkansas-Oklahoma District, Oklahoma City

subject: Request for Advisory Opinion

Taxpayer: [REDACTED]
Taxable year: [REDACTED]
Type of tax: Income

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This advisory is subject to the review procedures of CCDM (35)3(19)4(4). The CCDM procedures require us to transmit a copy of the memorandum to the National Office. The National Office has ten days from receipt of our memorandum to respond. The National Office may extend the review period if necessary. We will keep you informed of any delays.

DISCUSSION

We are responding to your June 7, 2000, memorandum in which you request our views on the validity of a Form 872 covering [REDACTED]'s ("[REDACTED]") taxable year. The Form 872 in question was not signed by an officer of [REDACTED]. Instead, an officer of [REDACTED]'s former common parent, [REDACTED] ("[REDACTED]"), signed the statute extension. As discussed below, there is a basis for defending the validity of the Form 872 given the unusual circumstances of this case. (b)(5)(AWP)

Facts

[REDACTED] was the common parent for a diverse group of companies involved in the energy business. Some of [REDACTED]'s subsidiaries mined [REDACTED] and sold the [REDACTED] to customers located in the United States and overseas. [REDACTED] formed [REDACTED] to market its [REDACTED] overseas. [REDACTED] was taxed as a foreign sales corporation ("FSC") under I.R.C. §§ 921 et seq.

Until [REDACTED],¹ [REDACTED] was the common parent for a group of affiliated corporations under I.R.C. § 1502 and filed a consolidated income tax return for the group. But during this period, [REDACTED], having qualified as a FSC, was not part of the consolidated return group. Instead, [REDACTED] filed its own Form 1120-FSC for each taxable year.

In [REDACTED], [REDACTED] decided to divest itself of the [REDACTED] operations. On [REDACTED], [REDACTED] entered into a stock purchase agreement with some unrelated third parties to sell the [REDACTED] operations. The stock purchase agreement covered [REDACTED]'s indirect interest in [REDACTED]. The parties closed the sale on [REDACTED]. After that date, [REDACTED] was not affiliated with [REDACTED].

¹ On [REDACTED], [REDACTED] ("[REDACTED]"), acquired all of [REDACTED]'s stock, terminating the [REDACTED] consolidated return group. Thereafter, [REDACTED] and its former consolidated subsidiaries were members of the [REDACTED] consolidated return group. [REDACTED] remains an existing corporation.

One provision in the stock purchase agreement specifically dealt with tax liabilities which had accrued prior to the [REDACTED] closing date. Section [REDACTED] of the stock purchase agreement stated:

• Taxes

(a) [REDACTED] shall have the right to file all Tax Returns and control the audit and subsequent contest with respect to any Taxes relating to the operation of the Business prior to and including the Closing Date. Subject to the last sentence of Section [REDACTED], any refunds of any Taxes relating to the operation of the Business prior to and including the Closing Date shall be for the account of [REDACTED].

The stock purchase agreement defined the "Business" as the production, transshipment, marketing and sale of [REDACTED] by the [REDACTED] subsidiaries being sold to the unrelated third-party purchasers. The "Business" included [REDACTED]'s operations. Under Section [REDACTED] of the stock purchase agreement, [REDACTED] had the right to control the conduct of any audits involving [REDACTED]'s [REDACTED] taxable year. [REDACTED] also had the right to control audits of the other open taxable years, [REDACTED] through [REDACTED]. The exact parameters of [REDACTED]'s authority under Section [REDACTED] of stock purchase agreement are not clear from the contract's language. Section [REDACTED] of the stock purchase agreement provides that the agreement is to be construed, performed and enforced in accordance with the laws of the State of New York.

After the [REDACTED] closing, [REDACTED] controlled all [REDACTED] audits covering the [REDACTED] taxable years. [REDACTED] personnel, or [REDACTED] personnel after the [REDACTED] acquisition, handled the examinations. [REDACTED] personnel, or [REDACTED] personnel after the [REDACTED] acquisition, also hired appropriate professional help to deal with the examinations and subsequent protests to Appeals. The audits were conducted at the same time as and as part of the [REDACTED] CEP examinations.

In handling these examinations, [REDACTED] took the following actions after [REDACTED] the closing date for the the [REDACTED] sale:

[REDACTED] files [REDACTED] tax
return prepared by [REDACTED] personnel

[REDACTED] Revenue Agent Report for [REDACTED] issued to [REDACTED]; Vice President, Controller and Counsel, [REDACTED] signs Form 870 for [REDACTED]'s [REDACTED] taxable years covering partial agreement for refund

Vice President, Controller and Counsel, [REDACTED] executes Form 872 for [REDACTED]'s [REDACTED] and [REDACTED] taxable years

Assistant Secretary, [REDACTED] executes Form 870-C, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment covering [REDACTED]'s refunds for [REDACTED] and [REDACTED] taxable years

Assistant Secretary, [REDACTED] executes Form 872-T terminating [REDACTED] Form 872-A for [REDACTED]'s [REDACTED] taxable years

[REDACTED] of [REDACTED] and [REDACTED], then owner of [REDACTED], executes Form 872 for [REDACTED]'s [REDACTED] taxable years

[REDACTED], then owner of [REDACTED] executes Form 872 for [REDACTED]'s [REDACTED] taxable years

[REDACTED], then owner of [REDACTED], executes Form 872 for [REDACTED]'s [REDACTED] taxable year

[REDACTED], then owner of [REDACTED], executes Form 872 for [REDACTED]'s [REDACTED] taxable year

The [REDACTED] Form 872 covering [REDACTED]'s [REDACTED] taxable year is the extension now being challenged. Prior to seeking the [REDACTED] statute extension, the assigned revenue agent was aware of [REDACTED]'s indirect sale of [REDACTED] during the [REDACTED] taxable year. The challenged consent for [REDACTED] reflects [REDACTED] signed the document as VP-Tax. [REDACTED] was an officer of [REDACTED] in charge of all the company's Internal Revenue Service examinations since the [REDACTED] acquisition. As Ernest & Young correctly points out in its memorandum to [REDACTED], [REDACTED] was never an officer of [REDACTED].

Some of the previous Forms 870, 872, 872-A and 872-T signed on behalf of [REDACTED] clearly reflected the signatory was an officer of [REDACTED]. Others were like the [REDACTED] consent and did not reflect what corporation the signatory was associated with. But, in each case, the signatory was an officer of [REDACTED], not an officer of [REDACTED]. Ernest & Young contends that, since the [REDACTED] Form 872 lacks a [REDACTED] officer's signature, the consent is invalid and the [REDACTED]'s [REDACTED] taxable year statute of limitations has expired.

We understand that the potential statute expiration issue may be moot in this case. The assigned international examiner has looked at [REDACTED]'s [REDACTED] taxable year. He plans to issue a no-change report to [REDACTED].

Analysis

I.R.C. § 6501(a) generally provides that income tax must be assessed within 3 years after the tax return is filed. I.R.C. § 6501(c)(4) modifies the general rule and permits the taxpayer and the government to extend the normal 3-year limitations period by an agreement in writing entered into prior to the limitations period's expiration. In the case of a corporate taxpayer, a written agreement to extend the statute of limitations is typically signed by a corporate officer with actual or apparent authority to bind the corporation or by an individual with a power of attorney meeting the requirements of Treas. Reg. § 601.503. Neither occurred here.

As Ernest & Young correctly points out, the signatory to the [REDACTED] taxable year Form 872 was not an officer of [REDACTED] at any time. Furthermore, that individual had no Form 2848 executed by [REDACTED] giving him the authority to represent [REDACTED] and to sign statute

extensions. If any authority to bind [REDACTED] is to be found here, it must come from another document, the stock purchase agreement where [REDACTED] indirectly sold [REDACTED] to an unrelated third-party.

The contractual rights granted to [REDACTED] in the [REDACTED], stock purchase agreement may provide [REDACTED] and its officers with sufficient authority to act on [REDACTED]'s behalf for the [REDACTED] taxable year. The language of Section [REDACTED] of the stock purchase agreement gives [REDACTED] broad authority to "control the audit and subsequent contest" with respect to [REDACTED]'s taxes both for the [REDACTED] taxable year and any prior taxable years. The language of Section [REDACTED] does not expressly give [REDACTED] the authority to sign statute extensions.

But, in New York where the contract is to be construed, the courts allow the use of extrinsic evidence, like course of performance, to construe a contractual provision. Big Tree Partners v. Bradford, 219 A.D.2d 27, 640 N.Y.S.2d 270 (N.Y. App. Div. 1996) (course of performance evidence admissible in construing regulated gas contract); CT Chemical (U.S.A.), Inc. v. Vinmar Impex, Inc., 81 N.Y.2d 174, 613 N.E.2d 159 (1993) (U.C.C. permits use of course of performance to construe sales contract); Rose Stone & Concrete, Inc. v. County of Broome, 76 A.D.2d 998, 429 N.Y.S.2d 295 (N.Y. App. Div. 1980) (course of performance evidence permissible in construing technical provision in sales contract). When this is done here, there is an arguable basis for claiming Section [REDACTED] gave [REDACTED] authority to sign statute extensions both for the [REDACTED] taxable year and any prior taxable years.

After the [REDACTED] stock purchase closing, [REDACTED] consistently acted as if it had broad authority to take actions on [REDACTED]'s behalf. In [REDACTED], and later in [REDACTED], [REDACTED], through its officers, signed two sets of Forms 870 covering [REDACTED]'s [REDACTED] taxable years. In each instance, [REDACTED] received refunds. When statute extensions were required for [REDACTED], [REDACTED], through its officers, readily signed the statute extensions. This occurred in [REDACTED] and [REDACTED] for the [REDACTED] and [REDACTED] taxable years and again in [REDACTED] for the [REDACTED] consent at issue here. [REDACTED], through its officers, also signed Forms 872-T in [REDACTED], terminating the Forms 872-A previously executed by [REDACTED] for the [REDACTED] through [REDACTED] taxable years.

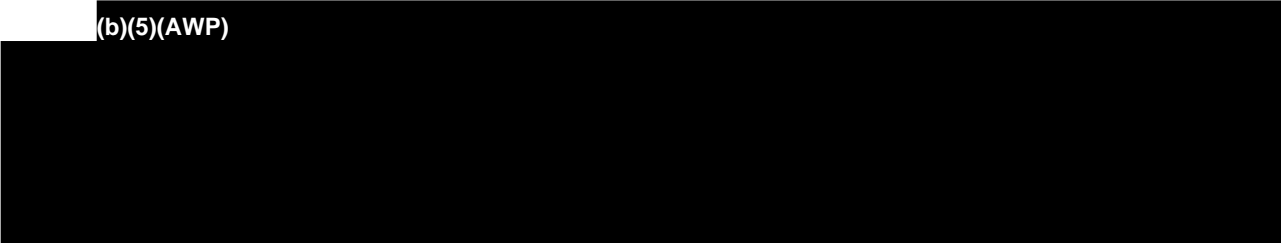
During this period of time, various [REDACTED] officers consistently believed they had the authority to act on [REDACTED] s behalf, apparently interpreting Section [REDACTED] as the source of that authority. Given this course of performance under the stock purchase agreement, Section [REDACTED] can arguably be interpreted as providing [REDACTED] with sufficient authority to sign the statute extension at issue.

The government will face an additional problem in defending the [REDACTED] statute extension. Most of the other forms mentioned above clearly were signed by an officer of [REDACTED] and reflected the [REDACTED] officer's capacity. In contrast, the [REDACTED] statute extension for [REDACTED] does not reflect that the signatory is a [REDACTED] officer and is signing the document in that capacity. Instead, the [REDACTED] Form 872 simply reflects that [REDACTED] is V.P.-Tax. This defect is not fatal to the government's case.

The courts have treated similar defects as clerical errors, focusing, instead, on whether the signatory had the authority to bind the taxpayer identified in the statute extension. In Pleasanton Gravel Co. v. Commissioner, 85 T.C. 839, 854 (1985), the Tax Court found it was unnecessary for the taxpayer's corporate name to be included on a signature line signed by "G.W. Jamieson Pres." In the Court's view, the corporate taxpayer's identification in other parts of the agreement and the signatory's designation as a corporate officer adequately reflected the capacity in which the consent was signed. Id. Similarly, in Eversole v. Commissioner, 46 T.C. 56, 60-61 (1966), the Tax Court found that a signature line's failure to reflect a fiduciary capacity was not fatal. Here again, the Court looked at whether the signatory had the actual authority to bind the taxpayer regardless of what clerical errors occurred on the signature line. Id.

In this case, [REDACTED] could only have been executing the [REDACTED] statute extension as Vice President - Tax for [REDACTED]. He was never an officer of [REDACTED]. Assuming [REDACTED] had the authority to act on [REDACTED] s behalf, [REDACTED] s failure to delineate clearly his corporate capacity should not defeat the [REDACTED] statute extension.

(b)(5)(AWP)

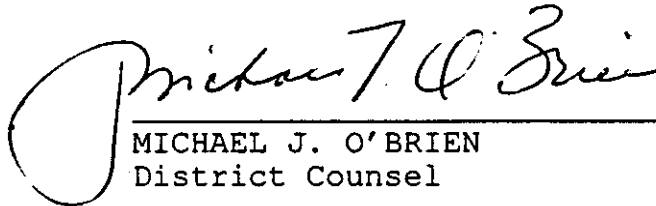


(b)(5)(AWP)

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Please contact Glenn McLoughlin at (405) 297-4803 if you have any questions.


MICHAEL J. O'BRIEN
District Counsel

cc: ARC (LC), Midstates Region
ARC (TL), Midstates Region

² Since the revenue agent knew of [REDACTED]'s indirect sale before he sought the [REDACTED] statute extension, the government would not be able to rely on estoppel to defend the [REDACTED] statute extension. Compare, Union Texas Intl. Corp. v. Commissioner, 110 T.C. 321, 336 (1998) (taxpayer estopped to deny validity of statute extension where agents had no knowledge of taxpayer's merger).